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No. 04-340

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SAN REMO HOTEL, L.P., THOMAS FIELD, ROBERT FIELD, and T & R INVESTMENTS CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NEW YORK, CONNECTICUT AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Is a Fifth Amendment takings claim barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal takings claim?

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INTEREST OF AMICI CURIAE

Amici States New York, Connecticut, and Vermont have two critical interests in this litigation. The first is the States' interest in their constitutionally-guaranteed status as independent sovereign entities, which would be undermined by the rule Petitioners advocate. Petitioners maintain that a decision by a State's highest court may be subjected to what is, in essence, appellate review by a United States district court. The Second Circuit recently reached just this conclusion in a decision that currently binds the Amici States, holding that takings plaintiffs may "reserve" federal claims for *de novo* consideration in federal court, irrespective of a final decision by state courts on issues essential to the cognate federal takings claim. *See Santini v. Conn. Haz. Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 104 (2004). This second "bite at the apple" that the Second Circuit permits, and which Petitioners now ask this Court to confirm, is contrary both to the Full Faith and Credit Act ("FFCA"), 28 U.S.C. § 1738, and to the underlying principles of our federal system. Amici States have a deep interest in preventing the erosion of "the comity between state and federal courts that has been recognized as a bulwark of the federal system," *Allen v. McCurry*, 449 U.S. 90, 96 (1980), and accordingly we strongly oppose the creation of the unwarranted exception to the FFCA advocated by Petitioners.

Second, it is the States and local governments that will bear the burden of the protracted and duplicative litigation that would result from Petitioners' proposed rule. This Court's cases correctly require courts faced with takings claims to engage in highly-detailed, fact-sensitive inquiries, a process that imposes significant costs on parties. Further burdening state and local governments with duplicative

litigation of such issues would compromise their ability to address in a timely and effective manner local land-use concerns, as the tortured path of this litigation demonstrates. Such a rule would severely hamper state and municipal efforts to "regulat[e] land use ... perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 (1982).

SUMMARY OF THE ARGUMENT

This Court should decline to carve out the new exception to the FFCA that Petitioners request. Petitioners have not been barred from litigating their federal claims in federal court, but only from relitigating particular issues that the California state courts have decided. That the application of California's issue preclusion law pursuant to the FFCA has led to dismissal of their federal claims means only that Petitioners suffer the commonplace effects of issue preclusion with respect to matters that have already been litigated in state proceedings.

Applying the FFCA in this manner comports with core principles of federalism, because giving issue-preclusive effect to state court judgments promotes comity and acknowledges that state courts are fully competent to adjudicate issues related to federal claims. Contrary to Petitioners' contentions, issue preclusion does not limit their ability to fully and fairly litigate their claims. Both the FFCA and California's law of collateral estoppel amply protect against that result. Finally, application of the FFCA is not contrary to the concerns that animate *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).

Petitioners' recommended approach would impose significant costs on the States and their municipal subunits. Because takings claims typically generate fact-intensive, complex, and protracted litigation, *de novo* relitigation in federal court of issues already decided in state court would be costly, time consuming and wasteful. And the effects of such a rule would be more than fiscal. Petitioners' proposed exception to the FFCA would delay and impair local planning efforts and community development, and would chill state and local governments' efforts to develop sound and responsible land-use policies.

POINT I

THE FULL FAITH AND CREDIT ACT PROHIBITS PETITIONERS FROM RELITIGATING *DE NOVO* TAKINGS ISSUES THAT HAVE BEEN FULLY AND FAIRLY DECIDED BY STATE COURTS.

Petitioners' proposed exception to the usual rules of collateral estoppel is unsupported by the case law, fails to take account of the requirements of the Full Faith and Credit Act, and, if adopted by this Court, would significantly diminish the States' constitutionally-guaranteed status as independent sovereign entities.

1. The plain meaning of the FFCA prohibits plaintiffs in Petitioners' position from relitigating in federal court issues that have already been decided by a state court. The FFCA requires that the "judicial proceedings" of a state be given "the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken." 28 U.S.C. § 1738. Consequently, if state law would bar relitigation of

an issue in the courts of that state once judgment has been rendered, the FFCA requires that the federal court apply the same rule and deny reconsideration of that issue in the federal courts. *See Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 373 (1996) (The FFCA "directs all courts to treat a state-court judgment with the same respect that it would receive in the courts of the rendering state.").

In *San Remo Hotel v. City and County of San Francisco* ("*San Remo II*"), 41 P.3d 87, 27 Cal. 4th 643 (2002), the California Supreme Court rejected Petitioners' facial and as-applied state takings claims. *See id.* at 107-11, 27 Cal. 4th at 672-79. In evaluating these claims, the California court held that, for all relevant purposes, the state and federal takings laws were congruent, and it therefore "analyze[d plaintiffs' state] takings claim under the relevant decisions of both this court and the United States Supreme Court." *Id.* at 100-01, 27 Cal. 4th at 664. Applying federal and state law, the court held that Petitioners could not prevail on either their facial or as-applied challenge. *Id.* at 107-11, 27 Cal. 4th at 672-79.

California law governing issue preclusion would bar Petitioners from relitigating the legal and factual issues decided by the California Supreme Court in *San Remo II*. Under California law, "[c]ollateral estoppel precludes relitigation of issues argued and decided in prior proceedings" if the following conditions are satisfied:

> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

Lucido v. Superior Court, 795 P.2d 1223, 1225, 51 Cal. 3d 335, 341 (1990).

All of these conditions are met in this case. First and most importantly, because for all relevant purposes the California Supreme Court "construe[s] the [state and federal takings] clauses congruently," and analyzed Petitioners' claim "under the relevant decisions of both this court and the United States Supreme Court," *San Remo II*, 41 P.3d at 100-01, 27 Cal. 4th at 664, there is no question but that the factual and legal issues Petitioners now seek to litigate are identical to those already decided. *See San Remo Hotel L.P. v. San Francisco City & County* ("*San Remo III*"), 364 F.3d 1088, 1096-98 (9th Cir. 2004) (agreeing with the California Supreme Court's analysis). Not surprisingly, in their brief to this Court, Petitioners cannot identify a single factual or legal issue they wish to litigate in federal court that has not already been decided in the state proceedings. In addition, the takings issues were fully litigated and necessary to the California court's final decision on the merits, *see San Remo II*, 41 P.3d at 107-11, 27 Cal. 4th at 672-79, thereby satisfying the second, third and fourth criteria listed in *Lucido*. Finally, Petitioners were the plaintiffs in the California action, satisfying the fifth threshold condition. Because state law gives the California Supreme Court's decision issue-preclusive effect, the FFCA requires that it be accorded the same effect in federal court.

2. Petitioners therefore can prevail only if their claim falls within an exception to the FFCA. For the reasons identified by Respondents in their merits brief, neither of the established exceptions to the FFCA applies here, and this Court should reject Petitioners' invitation to carve out a new one similar to that fashioned by the Second Circuit in *Santini*. Petitioners suggest that because *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), required them first to seek compensation in the California courts, it would be unfair to use the results of those state court proceedings to bar them from renewing their federal claims in federal court. That alleged unfairness is grossly overstated, and certainly does not justify creating a novel exception to the FFCA to accommodate Petitioners.

In fact, the FFCA does not bar Petitioners from bringing their federal takings claims in federal court. Rather, the FFCA prevents only the relitigation of those issues of fact and law that are relevant both to Petitioners' federal claims and to their already-litigated state claims. Accordingly, the Ninth Circuit did not hold that Petitioners could not bring their federal claims in federal court. Rather, it held only that the FFCA and California's law of collateral estoppel did not permit Petitioners to relitigate those factual or legal issues that had already been decided by the California courts. *See San Remo III*, 364 F.3d at 1094-95. And it reached this decision only after independently determining that "[t]he California Supreme Court's [takings] analysis was . . . equivalent to the approach taken [by the Ninth Circuit]." *Id.* at 1097.

In this case, Petitioners happen to be vulnerable to dismissal of their federal claims as a result of the state court judgment, but only because California interprets its takings clause congruently with the federal takings clause. Where state and federal takings law differ and a plaintiff has properly reserved a federal takings claim, however, there may well be no bar to litigating a federal takings claim in federal court after the state takings claim has been adjudicated. *See, e.g. Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) (no issue preclusion because Oregon law did not recognize takings based on investment-backed expectations). In sum, issue preclusion — unlike claim preclusion — implicates only a plaintiff's ability to relitigate issues already adjudicated. It does not, standing alone, take away a plaintiff's access to federal court.

3. Petitioners also contend, as the Second Circuit suggested in *Santini*, that it would be unfair to apply the FFCA to prevent them from relitigating in federal court issues already decided by a state court. But the FFCA, along with state laws of collateral estoppel, protect rather than thwart Petitioners' opportunity for a full and fair litigation of their federal claims. The only result that could surely be called unfair – and in deep tension with core principles of federalism – would be to deny a state-court judgment legitimate issue-preclusive effect.

As a general matter, issue preclusion is required by the principle of comity between state and federal courts. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 463 (1982) (recognizing the "principles of comity and repose embodied in § 1738"). As this Court has recently reaffirmed, "[f]ederal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity,

not competition and conflict, are essential to the federal design." *Kowalski v. Tesmer*, 125 S. Ct. 564, 569 (2004) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999)). It is therefore a central feature of our federalist system that the judgment of a state court is not subject to review by the lower federal courts, which would be the effective result of denying preclusion in this case. *See, e.g.*, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). To ignore a state court's decision on issues that are necessary to its judgment on the merits is to strip that judgment of its finality and effectiveness – a result that "would violate basic tenets of comity and federalism." *Kremer*, 456 U.S. at 478.

Amici States also strongly object to the "general distrust of the capacity of the state courts to render correct decisions," *Allen*, 449 U.S. at 105, that underlies Petitioners' request for a right to relitigate issues in a federal forum. That attitude is not only disrespectful of the States, but cannot be squared with "this Court's emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so." *Id.*; *see also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 275 (1997) ("A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism.").

Nor does it make a difference if the relevant issues involve questions of federal law, for state courts are fully competent to decide such matters:

> Interpretation of federal law is the proprietary concern of state, as well as federal, courts. It is the right and duty of the States, within their own judiciaries, to interpret and to follow the Constitution and all laws enacted pursuant to it, subject to a litigant's right of review in this Court in a proper case. The Constitution and laws of the United States are not a body of law external to the States, acknowledged and enforced simply as a matter of comity. The Constitution is the basic law of the Nation, a law to which a State's ties are no less intimate than those of the National Government itself. The separate States and the Government of the United States are bound in the common cause of preserving the whole constitutional order. Federal and state law "together form one system of jurisprudence."

Coeur D'Alene Tribe, 521 U.S. at 275-76 (quoting *Claflin v. Houseman*, 93 U.S. 130, 137 (1876)); *see also The Federalist* No. 82, p. 493 (A. Hamilton) (Rossiter ed. 1961) ("When . . . we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.")

Recognizing the general competence and jurisdiction of the state courts, this Court has rejected the "principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises." *Allen*, 449 U.S. at 103. In accordance with these tenets, the FFCA "embodies the view that it is

more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984). In short, a plaintiff suffers no harm from having issues related to a federal claim determined by the state courts.

Nor can Petitioners reasonably assert that the application of issue preclusion denies them a chance to fully and fairly litigate the relevant issues. In construing the FFCA, this Court has held that state proceedings must satisfy the "procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481. A further layer of protection is provided by the FFCA's requirement that a federal court, when deciding if a state-court judgment should be given preclusive effect, must apply that state's law of collateral estoppel. *See Matsushita Electric*, 516 U.S. at 373. In this case, for example, Petitioners are protected by California's rule that collateral estoppel may only be applied to issues that have been previously decided on the merits and are subject to a final judgment, and where the party against whom preclusion is sought is the same as, or in privity with, the party to the former proceeding. *Lucido*, 795 P.2d at 1225, 51 Cal. 3d at 341. While other states differ in the details, all limit issue preclusion in a manner that ensures parties a full and fair opportunity to litigate the matters involved in subsequent claims. *See generally* 46 Am. Jur. 2d *Judgments* §§ 539-552 (2004); Restatement (Second) of Judgments §§ 27-29 (1982).

4. Finally, contrary to the Second Circuit's reasoning in *Santini*, 342 F.3d at 128-30, application of issue preclusion to Petitioners' federal claims in no way conflicts with the

concerns underlying *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411. *England* held that a plaintiff who has invoked the jurisdiction of the federal courts may, when faced with *Pullman* abstention, reserve the right to have its federal claims litigated in those courts upon conclusion of the state-court proceedings. *Id.* at 421-22. *England*, however, recognized only a plaintiff's legitimate interest in avoiding *claim* preclusion. Its ruling was based on the "fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional *claims* can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination *of those claims*." *Id.* at 415 (emphasis added).

In fact, Petitioners have received exactly what *England* guarantees: access to the forum of their choice for their federal claims. Their only complaint is that the issues they litigated in the state-court proceeding will prevent them from succeeding on the merits on the claims they now bring in federal court. But the right provided in *England* to raise a claim in federal court does not also include a right to have each and every issue connected with that claim decided by a federal court. Contrary to what the Second Circuit thought, and Petitioners now contend, *England* does not require "an exception to the applicability of collateral estoppel for plaintiffs who litigate state-law takings claims in state court solely to comply with the ripeness requirement of [*Williamson County*]." *Santini*, 342 F.3d at 121. Instead, as demonstrated above, the plain meaning of the FFCA, principles of federalism and fairness, and this Court's decisions in *Allen* and *Migra* (both postdating *England*) all mandate according state judgments in such cases issue-preclusive

effect. *See Migra*, 465 U.S. at 84; *Allen*, 449 U.S. at 103-04; *see also id.* at 101 n.17 (distinguishing the interests at stake in *England*).

POINT II

DUPLICATE TAKINGS TRIALS WOULD UNDULY BURDEN GOVERNMENTS AND COURTS, AND WOULD INHIBIT TIMELY AND EFFECTIVE LAND-USE PLANNING.

Requiring federal takings claims to be fully relitigated in a second proceeding in federal district court following a state court adjudication of cognate state-law claims would unduly burden state and local governments, as well as the federal courts. Exempting plaintiffs who litigate state takings claims in state court from collateral estoppel would necessitate addressing anew issues of fact and law that have already been decided, for no reason other than to give plaintiffs another bite at the apple. Moreover, the delay inherent in such a scheme can be expected to impair local and state planning efforts and community development. Finally, the additional burden of a second judicial proceeding could well have a chilling effect on government efforts to develop and implement land-use regulations.

1. Regulatory takings claims generally involve intensely *ad hoc* factual inquiries. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Palazzollo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, *J.*, concurring). The States' collective experience confirms that property owners, regulators, and courts expend significant resources and time adjudicating takings claims – be it a *Lucas* claim involving background principles of nuisance law, a *Del Monte*

claim that a regulation does not "substantially advance" a legitimate governmental interest, or a *Penn Central* claim alleging that a regulation diminishes the value of a property and interferes with reasonable investment-backed expectations. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Penn Central*, 438 U.S. at 124.

Consequently, litigating a takings claim once, much less twice, is an expensive proposition for state and municipal governments. A 1992 survey of municipal officers indicated that in the previous two years "in most cities, litigation costs [rose] at a rate far in excess of the inflation rate." Susan A. MacManus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 Syracuse L. Rev. 833, 834 (1993). Among the factors survey respondents identified as driving the increase was "an explosion in the non-traditional use of civil rights statutes . . . to include cases involving such areas as zoning and land development." *Id.* at 836-37. In fact, nearly seventy-percent of survey respondents identified cases involving inverse condemnation or land use/zoning as among the cases "contributing most to their rising litigation costs" in the three years preceding the inquiry. *Id.* at 839-40, 850 (Table 6).

These cases cost so much because they are lengthy and complex and often require reliance on outside counsel and expensive expert witnesses. *See id.* at 840. Preparation for a regulatory takings claim frequently necessitates inquiries into the property's chain of title, historic use, and the effects of the proposed development, as well as the presentation of this information through extensive documentary evidence and verbal testimony. Parties often need to retain expert witnesses

– such as appraisers, architects, contractors, engineers, economists, geologists and biologists – to assist in preparing and litigating their cases. These experts may be required to address a wide range of issues, including economic theory,[1] appraisal and valuation,[2] land-use planning and zoning,[3] environmental impacts,[4] traffic patterns,[5] and health concerns.[6] Parties frequently must prepare maps, photographs and demonstrative exhibits, which often necessitate the use

[1] *See, e.g., Chevron v. Cayetano*, 198 F. Supp. 2d 1182, 1184-92 (D. Haw. 2002), *aff'd*, 363 F.3d 846 (9th Cir.), *cert. granted sub nom. Lingle v. Chevron*, 125 S. Ct. 314 (2004) (discussing evidence of economic effects of caps on rental prices).

[2] *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1243-45 (D. Nev. 1999), *aff'd in part, rev'd in part*, 216 F.3d 764 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002) (discussing expert appraisal testimony as to the value of high hazard lands); *Sag Harbor Port Assocs. v. Village of Sag Harbor*, 21 F. Supp. 2d 179, 182 (E.D.N.Y. 1998) (describing appraiser testimony on value of land subsequent to re-zoning).

[3] *See, e.g., Gazza v. N.Y. Dep't of Env. Cons.*, 217 A.D.2d 202, 206, 212-13 (2d Dep't 1995) (discussing testimony of zoning attorneys as to likelihood that land owner could obtain variance).

[4] *See, e.g., Del Monte*, 526 U.S. at 699-700 (noting evidence designed to undermine city's asserted factual premise for denying a development permit).

[5] *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 395-96 (1994) (noting insufficient evidence regarding traffic impacts resulting from expansion of store and possible mitigation measures).

[6] *See, e.g., John R. Sand & Gravel Co. v. United States*, 62 Fed. Cl. 556, 579-89 (2004) (describing testimony of public health experts regarding ground water contamination).

of highly technical Geographic Information Systems ("GIS") data, to depict the parcel and its characteristics. Some claims, such as those alleging that a regulation lacks a sufficient nexus to legitimate government interests, are especially resource-intensive to litigate, because they require a prediction in evidentiary form about the particular effect a challenged regulation would likely have both in the future and throughout the jurisdiction. *See, e.g., Chevron*, 198 F. Supp. 2d at 1184-92.

The burden of litigating a regulatory takings claim in *one* court system alone is exemplified by the litigation in *Gazza v. New York State Department of Environmental Conservation* ("*Gazza I*"), 159 Misc. 2d 591 (Sup. Ct., Suffolk County, 1993), *aff'd* ("*Gazza II*"), 217 A.D.2d 202 (2d Dep't 1995), *aff'd* ("*Gazza III*"), 679 N.E.2d 1035, 89 N.Y.2d 603; *cert. denied*, 522 U.S. 813 (1997). The petitioner in *Gazza* brought a regulatory takings challenge to a determination by the New York Department of Environmental Conservation ("DEC") that he was not entitled to a Tidal Wetlands Permit that was required in order for him to build a home. As the trial court noted, in a hearing that played out over approximately two-and-a-half months, the petitioner's witnesses included himself, as well as "an engineer, a surveyor, a marine operator, a dock builder, a real estate appraiser, and an attorney who specializes in zoning matters." *Gazza I*, 159 Misc. 2d at 592. For its part, the DEC "called an engineer, a zoning attorney, a real estate appraiser, and an adjoining landowner." *Id.*; *see also Gazza II*, 217 A.D. 2d at 205-06 (discussing testimony of appraisers, environmental consultant, and outside lawyers). In addition to the costs incurred at trial, the DEC bore the costs of appeals in the New York Appellate Division and Court of Appeals, with

the entire process from petition to final resolution spanning approximately five years.[7]

This description illustrates the burdens that takings challenges often impose on state and local governments. Such cases, of course, represent only the costs of state-court proceedings. Those costs would be largely replicated if subsequent, duplicative federal proceedings were to be permitted. Giving plaintiffs a second, federal bite at the apple would consume substantial resources of governments already hard-pressed by many educational, environmental, public

[7] New York courts provide a "two-step" review of this category of permitting decisions, asking first whether the permit denial is supported by substantial evidence in accordance with the relevant statutes and therefore valid, and second whether the restriction constitutes an unconstitutional taking requiring compensation. *See Gazza III*, 679 N.E.2d at 1039, 89 N.Y.2d at 612-613. Some property owners challenge the state agency's determination on both of these grounds, which results in even more time-consuming court proceedings. For example, in *Brotherton v. DEC*, 189 A.D.2d 814 (2d Dep't 1993), *on remand*, 172 Misc. 2d 334 (Sup. Ct., Suffolk County, 1997), *aff'd*, 252 A.D.2d 498 (1998), New York's Appellate Division first determined in January 1993 that the state agency's denial of a wetland permit was supported by substantial evidence. 189 A.D.2d at 816. The case then returned to the trial court for considerations of the petitioner's takings claims. *See* 172 Misc. 2d at 335. At a two-day hearing, the DEC called three expert witnesses: a DEC environmental engineer, a licensed real estate appraiser, and a DEC wetlands biologist/aerial photograph interpreter. To prepare for the hearing, the DEC also was required to produce several large-format aerial photographs, on which much of the case turned, to conduct a title search, and to identify and analyze historical documents and photographs. *See id.* at 336-38. The DEC was then subject to the cost of an appeal of this determination, which finally in July 1998 resulted in an affirmance of the judgment against the petitioner. 252 A.D.2d at 499.

safety, medical, and other demands. Neither the law nor common sense requires such a waste of funds.

2. Duplicative litigation of takings issues will not only burden States, municipalities, and their regulators with additional litigation costs, but can also be expected to delay implementation of land-use decisions, resulting in a regulatory uncertainty that will hamstring both regulators and developers.

Takings litigation is not only expensive, but is also protracted. The duplicative federal litigation to which Petitioners assert they are entitled would commence with a new complaint, perhaps followed by additional discovery, and then certainly resulting in a new round of pre-trial motions. Briefing, arguing and resolving dispositive motions in federal court routinely takes months or even years. Nor would litigation end with the second trial. Appeals often continue for many months and often years. *See, e.g., W.J.F. Realty Corp. v. Town of Southampton*, 220 F. Supp. 2d 140, 142-45 (E.D.N.Y. 2002) (describing eleven-year history of ongoing state and federal takings challenge to local land-use regulation and the Long Island Pine Barrens Protection Act).

These litigation delays have a real impact on governments, communities and landowners. Government planning efforts are often put on hold while takings cases work their way to resolution. Other permit decisions are suspended until there is regulatory certainty. For communities, the delay in the final determination regarding use of a major parcel of land can mean a long wait for other related development efforts. And since a large development project can significantly affect the character of the entire community, delay has far-ranging repercussions.

3. Finally, the burden of additional litigation threatens to chill appropriate land-use regulation by state and local governments. Where reasonable land-use controls, even if clearly required by law, invite extensive and time-consuming litigation, States and municipalities will be reluctant to implement them. For example, a government employee may well hesitate before issuing (or denying) a land-use permit if her decision is likely to lead to burdensome litigation. Even if she believes her decision will be upheld as correct, the inhibitory effect will still be substantial.

The Department of Justice, in opposing a proposed congressional effort to expand federal jurisdiction over takings claims, recognized the potential for just such a chilling effect. Expanding federal jurisdiction, the DOJ stated, would:

> hand[] developers a powerful new weapon in their negotiations with community officials: the threat of premature and potentially expensive Federal court litigation. This new weapon could well be used to disrupt State procedures designed to protect public health, safety, public resources and the environment. Confronted with the prospect of a potentially costly and time-consuming Federal court lawsuit, State and local officials would feel new pressure to approve land use proposals to avoid litigation, even if the proposed use might harm neighboring property owners and the community at large.

DOJ Letter to Hon. Charles T. Canady, Chairman, Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives, dated September 14, 1999, *reprinted in* H.R. Rep. No. 106-518, at 39 (2000).

In sum, the relitigation of takings claims would impose both direct and indirect harms on governments and communities. It would absorb already-scarce resources, delay planning and development efforts, and suppress land-use restrictions against the public interest. The Amici States urge the Court to free them of this unnecessary and counterproductive burden.

CONCLUSION

For the foregoing reasons, the Amici States urge this Court to affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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